Villa Putra Management Corp v Mayland View Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22NCVC-658–12 OF 2013
S M KOMATHY JC
8 OCTOBER 2014

Tort — Trespass to land — Remedy — Defendant's construction works on project encroached onto plaintiff's land — Whether defendant's liability proved by admission of fact of encroachment in pleadings when it sued architect in separate action for making defective drawings on project — Whether defendant bound by previous admission and could not contend otherwise in instant action by plaintiff — Whether plaintiff entitled to market value for defendant's use of trespassed land — Whether defendant not entitled to claim for improvements made to plaintiff's land as result of trespass as any work done was without plaintiff's approval and solely for defendant's benefit — Whether exemplary damages not payable as trespass was not deliberate and intentional

In the process of constructing a condominium ('the Regalia project') on its land, the defendant, a property developer, trespassed onto the adjoining land owned by the plaintiff. The trespass included the laying of tarmac on the plaintiff's existing road, the construction of a drainage system as well as 'underground structures' under the plaintiff's land which comprised telecommunication manholes, a liquefied petroleum gas system and the laying of electrical cables. At the trial of the instant action by the plaintiff for damages and removal of the structures, the defendant admitted liability to most of its acts of trespass but denied trespass with regard to the construction of the drainage system and the underground structures. The plaintiff sought damages for loss of use of the trespassed area based on market rent and also claimed exemplary damages saying the defendant's trespass was calculated to make profits. The defendant contended that if it was liable, the damages payable should only be for market rent for use of the tarred road until 12 November 2011 when the plaintiff erected a chain-link fence and prevented further use of the road by the defendant. The defendant was of the view that its tarring of the road was a benefit that accrued to the plaintiff and that the court should take that fact into account when awarding damages. With regard to the other structures, the defendant contended that if it was liable for trespass, only nominal damages should be awarded as there was no proof the value of the trespassed portion of the land had diminished as a result of the defendant's acts. At the trial, both parties tendered survey reports as well as valuation reports to show, respectively, the area trespassed by the defendant and the market rent of the land trespassed. Evidence was also given of an action the defendant had filed in the High Court against its architect, Ooi, for professional negligence in

that the drawings he had prepared for the Regalia project were defective and had caused the construction work on the project to encroach onto the plaintiff's land.

Held:

(1) The defendant's denial that it had constructed the drainage and underground structures on the plaintiff's land in trespass was discredited by the evidence of its assistant legal manager ('Syed Attila') who acknowledged that the defendant's claim against its architect, Ooi, was premised on the allegation that because his drawings for the Regalia project were defective, construction works on the project encroached onto the plaintiff's land. It was expressly pleaded in the defendant's statement of claim against Ooi that the defendant wrongfully laid tarmac, constructed drains and underground structures on the plaintiff's land. Syed Attila accepted that the defendant's claim against Ooi was formulated on the basis it had been deprived of the use of the tarred road, drains and underground structures by reason of their wrongful construction on the plaintiff's land. There was thus clear admission by the defendant in its claim against Ooi that the drains and underground structures were wrongfully constructed and/or laid on the plaintiff's land. The defendant was bound by that admission. It could not take a contrary position at this trial. A person could not resile from admissions of fact he had made in his pleadings which were admissible against him. Additional evidence to support the plaintiff's claim came in the form of 'as built' drawings which showed that the drainage and underground structures had been constructed on the plaintiff's land (see paras 13–15, 17 & 18).

(2) There was no merit in the defendant's contention that the trespass ceased on or before 12 November 2011 when the plaintiff built a chain-link fence at the boundary of its land. Although the defendant thenceforth was unable to use the plaintiff's road, until the tarmac and the structures were removed the trespass continued as they were done without the plaintiff's approval. The defendant was not entitled to claim for improvements done to the plaintiff's land as the same was done without the plaintiff's consent and were made solely for the defendant's benefit (see paras 34–34 & 42).

(3) The defendant's survey report could not be accepted as it contained hearsay evidence. The defendant's surveyor, Goh, acknowledged in cross-examination that he did not prepare the survey report and that the measurements contained in it were prepared by someone else engaged by the defendant in 2009. Goh accepted that he had merely adopted the measurements in his report. It was therefore wholly unsafe to give any weight to Goh's survey report. Accordingly, the court accepted the

plaintiff's second survey report showing that the area trespassed was 732.485 square metres or 7,884.403 square feet (see paras 38-39).

(4) The plaintiff was entitled to market rent from the defendant for the area wrongfully used by the latter at the lower figure of RM1.10 per square feet as estimated by the plaintiff's valuer. As for the period after December 2012, the court was not inclined to allow market rent in the light of evidence the defendant no longer had use of the plaintiff's road after the chain-link fence was erected sometime at the end of 2012. The plaintiff was, however, entitled to nominal damages for trespass after December 2012 (see paras 40 & 46).

(5) An award of exemplary damages was not warranted in the instant case as the trespass was not deliberate and intentional (see para 45).

[Bahasa Malaysia summary

Dalam proses membina kondominium ('projek Regalia') atas tanahnya, defendan, pemaju hartanah, telah menceroboh ke atas tanah bersebelahan yang dimiliki oleh plaintif. Pencerobohan itu termasuklah meletakkan batu berturap di atas jalan plaintif yang sedia ada, pembinaan sistem perparitan dan juga 'struktur bawah tanah' di bawah tanah plaintif yang terdiri daripada lurang telekomunikasi, sistem gas petroleum cecair dan pemasangan kabel elektrik. Dalam perbicaraan tindakan ini oleh plaintif untuk ganti rugi dan pengalihan struktur-struktur, defendan telah mengakui liabiliti dengan kebanyakan perbuatan pencerobohannya tetapi menafikan pencerobohan berkaitan pembinaan sistem perparitan dan struktur-struktur bawah tanah. Plantif memohon ganti rugi untuk kehilangaan penggunaan kawasan yang dicerobohi berdasarkan sewa pasaran dan juga menuntut ganti rugi teladan dengan mengatakan pencerobohan defendan telah dikira untuk membuat keuntungan. Defendan berhujah bahawa jika ia bertanggungjawab, ganti rugi yang kena dibayar hendaklah hanya sewa pasaran untuk penggunaan jalan berturap sehingga 12 November 2011 apabila plaintif menaikkan pagar rantai berkait dan dihalang daripada penggunaan lanjut jalan itu oleh defendan. Defendan berpendapat bahawa penurapan jalan olehnya adalah suatu faedah yang terakru kepada plaintif dan bahawa mahkamah patut mengambil kira fakta itu apabila memberi award ganti rugi. Berhubung struktur-struktur lain defendan berhujah bahawa jika ia bertanggungjawab untuk pencerobohan, hanya ganti rugi nominal patut diawardkan kerana tiada bukti yang nilai bahagian tanah yang dicerobohi telah berkurangan akibat perbuatan defendan. Semasa perbicaraan, kedua-dua pihak mengemukakan laporan kaji selidik dan juga laporan penilaian untuk menunjukkan, masing-masing, kawasan yang dicerobohi oleh defendan dan sewa pasaran tanah yang dicerobohi itu. Keterangan juga telah diberikan tentang tindakan yang telah difailkan oleh defendan di Mahkamah Tinggi terhadap arkiteknya, Ooi, untuk kecuaian professional di mana lukisan-lukisan yang telah disediakan olehnya untuk projek Regalia adalah cacat dan telah menyebabkan kerja pembinaan ke atas

projek itu menceroboh ke tanah plaintif. A

Diputuskan:

(1) Penafian defendan bahawa ia telah membina perparitan dan struktur-struktur bawah tanah itu atas tanah plaintif yang menceroboh telah diragui melalui keterangan penolong pengurus undang-undang ('Syed Attila') yang mengakui bahawa tuntutan defendan terhadap arkiteknya, Ooi, berasaskan pengataan yang oleh kerana lukisan-lukisannya untuk projek Regalia adalah cacat, kerja-kerja pembinaan atas projek yang menceroboh atas tanah plaintif. Ia telah dipli dengan nyata dalam penyataan tuntutan defendan terhadap Ooi bahawa defendan tersalah letak turap, parit-parit yang dibina dan struktur-struktur bawah tanah atas tanah plaintif. Syed Attila menerima bahawa tuntutan defendan terhadap Ooi dirumuskan berasas telah terkilan untuk penggunaan jalan berturap, parit-parit dan struktur-struktur bawah tanah oleh sebeba pembinaan salah mereka atas tanah plaintif. Oleh itu terdapat pengakuan jelas oleh defendan dalam tuntutannya terhadap Ooi bahawa parit-parit dan struktur-struktur bawah tanah itu telah dibina dan/atau diletakkan secara salah atas tanah plaintif. Defendan terikat oleh pengakuan tersebut. Ia tidak boleh mengambil kedudukan bertentangan dalam perbicaraan ini. Seseorang tidak boleh mengabaikan penerimaan fakta yang dia telah dibuat dalam plidingnya yang boleh diterima terhadapnya. Keterangan tambahan untuk menyokong dakwaan plaintif yang datang dalam bentuk lukisan-lukisan 'as built' yang menunjukkan bahawa perparitan dan struktur-struktur bawah tanah telah dibina atas tanah plaintif (lihat perenggan 13–15, 17 & 18). B C D E F

(2) Tiada merit dalam hujah defendan bahawa pencerobohan itu terhenti pada atau sebelum 23 November 2011 apabila plaintif membina pagar rantai berkaitan di sempadan tanahnya. Walaupun defendan selepas itu tidak dapat menggunakan jalan plaintif, sehingga turapan dan struktur-struktur itu dialihkan pencerobohan itu berterusan kerana ia dilakukan tanpa kelulusan plaintif. Defendan tidak berhak untuk menuntut untuk penambaikkan yang dilakukan ke atas tanah plaintif kerana ia telah dilakukan tanpa persetujuan plaintif dan dibuat semata-mata untuk faedah defendan (lihat perenggan 35–34 & 42). G H

(3) Laporan kaji selidik defendan tidak boleh diterima kerana ia mengandungi keterangan dengar cakap. Pengkaji selidik defendan, Goh, mengakui dalam pemeriksaan balas bahawa dia tidak menyediakan laporan kaji selidik itu dan bahawa ukuran yang terkandung dalamnya telah disediakan oleh orang lain yang dilantik oleh defendan pada tahun 2009. Goh telah menerima bahawa dia hanya menerima pakai ukuran dalam laporannya. Oleh itu ia adalah tidak selamat langsung untuk I

bergantung kepada laporan kaji selidik Goh. Sewajarnya, mahkamah telah menerima laporan kaji selidik kedua plaintif yang menunjukkan bahawa kawasan yang dicerobohi adalah 732.485 meter persegi atau 7,884.403 meter persegi (lihat perenggan 38–39).

(4) Plaintif berhak kepada sewa pasaran daripada defendan untuk kawasan yang secara salah digunakan oleh defendan pada harga lebih rendah iaitu RM1.10 sekaki persegi seperti dianggarkan oleh penilai plaintif. Bagi tempoh selepas Disember 2012, mahkamah tidak cenderung untuk membenarkan sewa pasaran berdasarkan keterangan yang defendan tidak lagi menggunakan jalan plaintif selepas pagar rantai berkait itu dinaikkan sekitar akhir 2012. Walau bagaimanapun, plaintif berhak kepada ganti rugi nominal untuk pencerobohan itu seleas Disember 2012 (lihat perenggan 40 & 46).

(5) Award untuk ganti rugi teladan tidak wajar dalam kes ini kerana pencerobohan itu tidak sengaja dan disengajakan (lihat perenggan 45).]]

Notes

For cases on remedy, see 12(2) *Mallal's Digest* (5th Ed, 2013 Reissue) paras 2099–2157.

Cases referred to

Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors [1993] 3 MLJ 352 ; [1994] 1 CLJ 19, HC (refd)

Ellis v Loftus Iron Co (1874) LR 10 CP 10 (refd)

Esso Petroleum Co Ltd and Another v Southport Corporation [1955] 3 All ER 864, HL (refd)

Inverugie Investments Ltd v Hackett [1995] 1 WLR 713, PC (refd)

Ministry of Defence v Ashman (1993) 66 P & CR 195, CA (refd)

Palm Oil Research And Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & Another Appeal [2005] 3 MLJ 97, FC (refd)

Penarth Dock Engineering Co Ltd v Pounds [1963] 1 Lloyd's Rep 359, QBD (refd)

Raphael Pura v Insas Bhd & Anor [2003] 1 MLJ 513 ; [2003] 1 CLJ 61, FC (refd)

Sin Heap Lee-Marubeni Sdn Bhd v Yip Shou Shan [2005] 1 MLJ 515, CA (folld)

Stoke-on-Trent City Council v W&J Wass Ltd [1988] 3 All ER 394, CA (refd)

Swordheath Properties Ltd v Tabet [1979] 1 WLR 285, CA (refd)

Tay Tuan Kiat & Anor v Pritam Singh Brar [1987] 1 MLJ 276 (refd)

Thorp v Holdsworth (1876) 3 Ch D 637, Ch D (refd)

Zulpadli bin Mohammad & Ors v Bank Pertanian Malaysia Bhd [2013] 2 MLJ 915, CA (refd)

Sim Kok Yew (Mohd Zhafri bin Aminurashid with him) (K Y Sim & Co) for the plaintiff.
Alex Tan Chie Sian (Wong Kian Kheong) for the defendant.

SM Komathy JC:

[1] The plaintiff and the defendant are owners of adjoining properties. The defendant carried out construction works on its land. The plaintiff alleges that in the course of the construction work, the defendant had encroached onto its land. It has committed trespass by erecting permanent structures on a portion of its land.

THE BACKGROUND

[2] The plaintiff, Villa Putra Management Corp, is the owner of Lot No 46, Section 51, Kuala Lumpur on which a condominium complex known as Villa Puteri is situated. The defendant, Mayland View Sdn Bhd, is the owner of Lot 48 and a property developer.

[3] In 2006 or thereabouts, the defendant and/or its contractor commenced work on the construction of a residential condominium development called Regalia on Lot 48.

[4] The plaintiff informed the defendant sometime in January 2010, that the construction work had encroached onto its land. It complained that the defendant had laid tarmac and constructed drainage on its land. The plaintiff also complained that structures had been constructed and/or laid under its land surface, namely, underground telecommunication manholes, liquefied petroleum gas system and electrical cables ('the underground structures'). It sought damages and the removal of these structures.

[5] The defendant denied the acts of trespass complained by the plaintiff.

[6] On 19 November 2011, the plaintiff commenced this action by originating summons against the defendant to seek damages for continuing trespass. The originating summons was decided in the plaintiff's favour. The defendant appealed. By an order dated 18 October 2013, the Court of Appeal allowed the appeal and ordered, among others, that the proceedings continue as if the action had been begun by writ. The action was thereafter set down for trial.

LIABILITY

[7] On the date of the trial, defendant admitted liability. The admission of liability was recorded in these terms:

(a) the defendant and/or the defendant's agent had placed construction material for the defendant's 'Regalia' project on part of plaintiff's land;

(b) vehicles belonging to the defendant and/or the defendant's agent had entered part of plaintiff's land to access the construction site of the project;

(c) upon request and application of the defendant, Tenaga Nasional Bhd had connected electrical cables to the defendant's power supply substation for the construction site of the project erected on part of plaintiff's land;

(d) the defendant had tarred the existing road on the plaintiff's land to access the construction site of the project; and

(e) the defendant had entered part of plaintiff's land for purpose of laying electrical and communication cables for the project.

[8] It is apposite to note that the admission of trespass was confined to the laying of the tarmac and did not include the drainage and underground structures. Consequently, the trial proceeded on the issue of liability for the disputed acts of trespass and damages.

EVIDENCE

[9] The plaintiff called five witnesses. They were Ooi Tse Lye ('Ooi') , the architect for the Regalia development project, Abdul Pilus Bharudin ('Pilus') a surveyor, Stephenie Lim Liew Sim ('Lim') a valuer, Zoolhilmi bin Muhammad Jamil a Tenaga Nasional Bhd engineer and one Suhaime bin Shamsudin a council member of the plaintiff's management corporation.

[10] The defendant, on the other hand, called three witnesses; Goh Leong Sen ('Goh') a surveyor, Jamie Tan Mun Onn a valuer, and its assistant legal manager Syed Attila Aidid ('Syed Attila').

[11] The documentary evidence in this case consisted of three survey reports. Pilus had prepared two reports dated 28 August 2011 and 12 November 2011, respectively, whilst Goh had prepared one. The survey reports indicated the area that that had been encroached and wrongfully used by the defendant. According to Pilus, the plaintiff appointed him to do the second report when the plaintiff discovered that the area trespassed by the defendant had expanded.

I should point out at this juncture, there was a big discrepancy between the estimates given by Pilus and Goh on the area trespassed by the defendant.

[12] The parties also produced two valuation reports to assist the court to determine the market rent of the land trespassed.

DRAINAGE AND OTHER STRUCTURES

[13] I turn now to consider whether there is evidence to support the plaintiff's allegation that the defendant had constructed drainage and the underground structures on its land. The defendant strongly denied the allegation.

[14] In my view, the denial of the defendant is discredited by the evidence given by its assistant legal manager, Syed Attila. Syed Attila was cross-examined on an action that the defendant had instituted in the Kuala Lumpur High Court against its architect, Ooi, for professional negligence. He explained that the defendant's claim against Ooi was premised on the allegation that the drawings prepared by Ooi in respect of the Regalia project were defective. He acknowledged that the statement of claim against Ooi alleged that by reason of the defective drawings, construction works in Regalia had encroached into the plaintiff's land. It was expressly pleaded that the defendant had wrongfully laid tarmac, constructed drains and underground structures on the plaintiff's land.

[15] In further cross-examination, Syed Attila accepted that the defendant's claim against Ooi was formulated on the basis that it has been deprived of the use of the tarred road, drains and the underground structures by reason of their wrongful construction on the plaintiff's land instead of within its own boundary. It would be helpful if I set out the evidence given by him in this regard:

Q: I refer you to page 272 of Bundle B, which is the statement of claim by Mayland against the architect. I, referring to paragraph 8.1, Encik Syed. Can you confirm that there is a surveyor report dated 3.2.2013 confirming that Mayland have trespassed or encroached onto Lot 70 and 46?

A: Which report you are referring to Sir?

Q: The 8.1. If you refer to 8.1 Encik Syed, it is saying that, if I read, my lady? 'Subsequently based on the as built survey plan No. SGWP101 Site (D) dated 21.4.2011 and as built survey plan SGW101 site (G) dated 3.2.2013 the plaintiff discovered the constructions of flyover road and metalled road pursuant to the defendant's drawing 1 and drawing 2 had trespassed and encroached onto the joining lands of Lot 70 and 46.'

A: Based on this paragraph, yes, my lady.

Q: I refer you to page 277 of the same bundle. I'm referring to paragraph B first. Encik Syed. Based on paragraph B, can you confirmed what are the structures built which have trespassed onto Lot 46?

A: For the sum of 437...?

Q: Yes, what are the structures? Here we are talking about the structures. What are the structure built, have trespassed, encroached?

A: My lady, based on this paragraph, sub-paragraph B. It is for the construction of the redundant metalled road and drainage on Lot 46.

Q: Sorry, just to clarify, my question is ... what are the structures built, which is referred to here, trespassed into Lot 46?

A: Specifically, I don't have any ...

Q: Here they are referring to the construction cost of redundant metalled road and drainage on Lot 46.

A: Yes, which I have already answered you.

Q: So you are saying these are the 2 items?

A: It should be as per the construction of the paragraph, my lady.'

Q: I refer you to paragraph C of the same page, here you are saying that as a result of the trespass, Mayland have been deprived of the usage of the metalled road as well as the telecommunication manhole and also liquefied petroleum gas system. Can you explain to the court what does that mean?

A: I think it's self-explanatory. We cannot utilise what you just mentioned just now, the metalled road and the telecommunication manhole ...

Q: Why Mayland cannot utilise the 3 facilities?

A: Perhaps it has been blocked.

[16] It is instructive to refer to the dicta of Ramly Ali JCA in *Zulpadli bin Mohammad & Ors v Bank Pertanian Malaysia Bhd* [2013] 2 MLJ 915 on the evidential value of admissions in pleadings. In discussing this issue, His Lordship stated (at p 923):

> [20] The foregoing in law amounts to judicial admissions which had been made by the respondent. In this regard, we are in agreement with the decision in the case of *Hu Chang Pee v Tan Sri Datuk Paduka (Dr) Ting Pek Khiing* [1999] 3 MLJ 402 (subsequently affirmed by the Court of Appeal in *Tan Sri Datuk Paduka (Dr) Ting Pek Khiing v Hu Chang Pee (also known as Hii Chang Pee)* [2011] 6 MLJ 193; [2010] 1 LNS 1269) as follows:
>
> (2) The plaintiff in entitled to rely on the defendant's affidavit

filed in Suit No 22–18 of 1996 as the basis in the present suit. What was stated by the defendant in his affidavit dated 3 December 1996 was actually an admission by him. Admission in pleadings is judicial admission and can be made the foundation of rights. Admission are admissible against the party making them.

[21] Further in *YK Fung Securities Sdn Bhd v James Capel (Far East) Ltd* [1997] 2 MLJ 621; [1997] 4 CLJ 300, Mahadev Shanker JCA held as follows:

> For the record, however, we must state here that it is the opinion of this court that once a party to litigation has admitted a fact in his pleadings he shall not be heard to contend the contrary in the trial or in any appeal therefrom.

[22] The respondent's own admission in the earlier suit as well as the amended statement of claim in the present suit show that the appellants were innocent victims as much as the respondent was. The respondent is estopped from taking a position different from that pleaded in its defence in the earlier suit.

[17] The dicta quoted above illustrates that admissions made in pleadings are admissible against the person making them and a person cannot resile from admissions of fact made by him in his pleadings. Applying the foregoing principle to the facts here. There is a clear admission by the defendant in the its claim against Ooi, that the drains and underground structures had been wrongfully constructed and/or laid on the plaintiff's land. The defendant is bound by them. It is not open to the defendant take a contrary position at this trial.

[18] Additional piece of evidence to support the plaintiff's claim comes in the form of as built drawings. The drawings demonstrate that the drainage and underground structures have been constructed on the plaintiff's land. Before I proceed to consider the damages claimed by the plaintiff, it will be helpful to set out the damages claimable for trespass to land.

DAMAGES FOR TRESPASS TO LAND

[19] Trespass is an injury to possession and not to ownership or title. This statement explains the central principle of the law of trespass. The principle is clearly set out in *Clerk and Lindsell on Torts*. It is stated:

> Trespass to land consists in any unjustifiable intrusion by one person upon land in the possession of another.

[20] And it was graphically illustrated as far back as 1874 by Coleridge CJ in *Ellis v Loftus Iron Co* (1874) LR 10 CP 10 at p 12, where he observed:

> ... if the defendant place a part of his foot on the plaintiff's land unlawfully, it is in law as much a trespass as if he had walked half a mile on it.

[21] The tort of trespass to land is a tort which is actionable per se; damage need not be proven for the tort to be made out.

[22] *Halsbury's Laws of England*, 4th Ed, Vol 45(2) (London: Butterworths, 1999) at p 343, para 526, addresses the law on damages for trespass to land as follows:

> In a claim of trespass, if the claimant proves the trespass he is entitled to recover nominal damages, even if he has not suffered any actual loss. If the trespass has caused the claimant actual damage, he is entitled to receive such an amount as will compensate him for his loss. Where the defendant has made use of the claimant's land, the claimant is entitled to receive by way of damages such a sum as should reasonably be paid for that use. ... where the defendant cynically disregards the rights of the claimant in the land with the object of making a gain by his unlawful conduct, exemplary damages may be awarded. If the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, the general damages may be increased.

[23] A defendant's right to sue for damages based on the market rental value of a property wrongfully occupied or used is a principle well established in the law, and one which has been described by Nicholls LJ in *Stoke-on-Trent City Council v W&J Wass Ltd* [1988] 3 All ER 394 as the 'user principle'. In this regard, the English Court of Appeal case of *Swordheath Properties Ltd v Tabet* [1979] 1 WLR 285 is often cited for the proposition that (at p 288):

> when [the plaintiff] has established that the defendant has remained on as a trespasser in residential property, [he] is entitled, without bringing evidence that he could or would have let the property to someone else in the absence of the trespassing defendant, to have as damages for the trespass the value of the property as it would fairly be calculated; and, in the absence of anything special in the particular case it would be the ordinary letting value of the property that would determine the amount of damages ...

[24] In *Ministry of Defence v Ashman* (1993) 66 P & CR 195 ('Ashman') Hoffmann LJ declared that a defendant can claim for damages for trespass on two bases. Hoffmann LJ explained (at pp 200–201):

> A person entitled to possession of land can make a claim against a person who has been in occupation without his consent on two alternative bases. *The first is for the loss which he has suffered in consequence of the defendant's trespass*. This is the normal measure of damages in the law of tort. The second is the value of the benefit which the occupier has received. This is a claim for restitution. The *two bases of claim are mutually exclusive* and the plaintiff must elect before judgment which of them he wishes to pursue. (Emphasis added.)

[25] The Privy Council in *Inverugie Investments Ltd v Hackett* [1995] 1 WLR 713, at pp 715B and 718A-B elaborated as follows:

> The plaintiff may not have suffered any actual loss by being deprived of the use of his property. But under the user principle he is entitled to recover a reasonable rent for the wrongful use of his property by the trespasser. Similarly, the trespasser may not have derived any actual benefit from the use of the property. But under the user principle he is obliged to pay a reasonable rent for the use which he has enjoyed. The principle need not be characterised as exclusively compensatory, or exclusively restitutionary; it combines elements of both.

[26] The cases quoted above illustrate that in trespass, a plaintiff can claim for either loss of use of his land or the profit the defendant has made by using his land. A claim for market rent for loss of use pursuant to the user principle is on the basis of the amount that the plaintiff would have obtained if he had let the property. A plaintiff seeking market rent does not have to show that he would actually have let the premises in the relevant period; if he would not have let the property he is, in fact seeking restitution of the defendant's unjust enrichment arising from the benefit the defendant had obtained by having use of the property. He would likewise be seeking restitution of the defendant's unjust enrichment if he sought to claim the profits which the defendant actually made. The measure of damages is therefore not what the plaintiff has lost ,but the benefit or gain the defendant has obtained by having use of the property. See *Penarth Dock Engineering Co Ltd v Pounds* [1963] 1 Lloyd's Rep 359.

DAMAGES SOUGHT BY THE PLAINTIFF

[27] Based on the guidance given in *Ministry of Defence v Ashman*, the plaintiff elected to claim for damages on the basis of loss of use. It claimed market rent from the date of trespass until the unauthorised structures are removed. The plaintiff also claimed exemplary damages.

THE DEFENDANT'S RESPONSE

[28] The defendant accepted that it was liable to pay market rent for the tarmac it had laid on the plaintiff's land. As regards the other structures, it took the stand that even if these had been constructed on the plaintiff's land, only nominal damages can be awarded because there was no proof that the value of the trespassed portion had diminished as a result of these acts.

DISCUSSION

[29] There are three issues that need to be addressed in order to determine the damages payable to the plaintiff for the construction of the unauthorised structures. They are:

Issue I: Duration of trespass

[30] The first issue relates to when the trespass first occurred. The plaintiff contended that the trespass had occurred in 2006. The defendant submitted that the plaintiff is bound by its pleading that the trespass had occurred in 2010 and cannot set up a claim which is inconsistent with it. The defendant further submitted that if it had any inkling that the plaintiff intended to adopt this position at the trial, it could have pleaded limitation. It had been disadvantaged by reason of the plaintiff's failure to appraise it of their position on this issue at any time before the trial.

[31] The courts are familiar with the learning and authorities on the importance of parties formulating their case on the basis of their pleaded case that it would be waste of judicial time to traverse ground so well known as *Raphael Pura v Insas Bhd & Anor* [2003] 1 MLJ 513 ; [2003] 1 CLJ 61, *Palm Oil Research And Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & Another Appeal* [2005] 3 MLJ 97, *Thorp v Holdsworth* (1876) 3 Ch D 637 and *Esso Petroleum Co Ltd v Southport Corporation* [1955] 3 All ER 864. I accept that it is a basic rule of pleading that a party is bound by his/her pleadings.

[32] The function of pleadings in an action is to define the issues between the parties. In a case where the evidence led in an action goes beyond the strict letter of a pleading , it is incumbent on a litigant who wishes to rely on this evidence to seek an amendment of the pleadings to bring them into harmony with the evidence. That course was not pursued in this case.

[33] I therefore accept the contention advanced by the defendant. It is not open to the plaintiff to depart from its pleaded case that the trespass had first occurred in 2010. It is not without significance that the plaintiff had instructed its property valuer to conduct a valuation on the basis that the trespass had occurred in early 2010. I therefore find that the trespass had started in January 2010.

[34] Next, the defendant disputed the plaintiff's claim for damages on the basis that the above trespass is still continuing. It contended that the trespass had ceased on or before 12 November 2011. In support of this submission, reliance was placed on the photographs enclosed to the second survey report prepared by Pilus. It was said that the photographs enclosed to the report revealed that construction debris, heavy machinery, TNB substation and all other items which appeared in the photographs enclosed to the first survey report had been cleared from the land. In the alternative, it was argued that the trespass ceased when the plaintiff erected a chain link fence demarcating the boundary between Lot 46 and Lot 48 sometime in December 2012.

[35] I find no merit in the position taken by the defendant. It is true that the defendant was no longer able to use the plaintiff's road when the chain link fence was erected, but this does not mean the trespass had ceased. Until the tarmac and the structures are removed, the trespass continues as it was done without the approval of the plaintiff as the landowner. See *Sin Heap Lee-Marubeni Sdn Bhd v Yip Shou Shan* [2005] 1 MLJ 515 and *Tay Tuan Kiat & Anor v Pritam Singh Brar* [1987] 1 MLJ 276.

Issue II : Area of trespass

[36] The second issue relates to the area of trespass. There are three survey reports to show the area trespassed. The plaintiff has two and the defendant one. The plaintiff's surveyor Pilus estimated the area trespassed by the defendant at 732.485sq meters or 7,884.403sqft and the defendant's surveyor Goh, on the other hand, estimated it as 382.5sq meters or 4,117sqft.

[37] The defendant contended that the plaintiff's survey report should be rejected on two grounds. First, Pilus had no personal knowledge of the area trespassed. The measurement carried out by Pilus, by his own admission, was based on information given to him by the plaintiff. This rendered his measurements unreliable. Secondly, the plaintiff did not cross-examine Tan on a statement in his valuation report that the area trespassed was only 382.5sq meters or 4,117sqft.

[38] The defendant's submission is unmeritorious. I fail to see why Pilus needs to have personal knowledge of the area trespassed to be competent to carry out the necessary measurements. He is, in my view, entitled to rely on the information given to him by his client to do the measurements. That said, I must now consider the reliability of the report done by the defendant's surveyor, Goh. It is imperative to note that in cross examination, Goh acknowledged that he did not prepare the survey report and that the measurements contained therein had been prepared by someone else who had been engaged by the defendant in 2009, for the purpose of applying for a private right of way on the plaintiff's land. Goh accepted that he had merely adopted the measurements it in his report.

[39] In the light of Goh's admission, it would be wholly unsafe to give any weight to his survey report. It contained hearsay evidence. Accordingly, I accept the second survey report prepared by Pilus that the area trespassed by the defendant was 732.485sq meters or 7,884.403sqft.

Issue III : Market rental

[40] On the third issue, it is accepted that the plaintiff is entitled to receive market rent from the defendant for the area wrongfully used by the latter. The parties relied on the valuation reports prepared by their respective valuers to show the market rent for the land. Fortunately, the rates quoted by both valuers were consistent. The plaintiff's valuer Lim estimated it at RM1.10 per sqft and Tan's figure is RM1.19 per sqft. I accept the lower figure recommended by Lim.

IMPROVEMENTS DONE ON ROAD

[41] The defendant contended that it had spent about RM70,000 to lay tarmac on the road that had existed on the plaintiff's land. By doing so, it had improved the condition of the road and therefore any damages awarded to the plaintiff must take this this fact into consideration.

[42] In my judgment, the defendant is not entitled to claim for the improvements done on Lot 46 as the same was done without consent from the plaintiff and made solely for the benefit of the defendant. In this connection, I will be useful to refer to a short passage in the judgment of Edgar Joseph Jr SCJ in *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1993] 3 MLJ 352 ; [1994] 1 CLJ 19, wherein he observed (at p 50):

> Proprietary estoppel is one of the exceptions to the general rule that a person who spends money on improving of another has no right to claim reimbursement or any proprietary interest in property. Unlike promissory estoppel, proprietary estoppel when it operates is permanent in its effect and it is also capable of operating positively so as to give a cause of action.

[43] In view of the principle laid down in the above case, I am unable to accede to the application made by the defendant.

EXEMPLARY DAMAGES

[44] The plaintiff also sought exemplary damages on the basis that the conduct of the defendant in committing trespass was calculated to make profits. The defendant had encroached onto its land to meet the requirements of the building authorities in respect of the Regalia project. The case of *Sin Heap Lee-Marubeni Sdn Bhd v Yip Shou Shan* [2005] 1 MLJ 515 was cited in support.

[45] In my judgment, an award of exemplary damages is not warranted in the instant case as the trespass was not deliberate and intentional.

QUANTAM

[46] I therefore award the plaintiff damages for the loss of use of the area trespassed by the defendant for the period from January 2010–December 2012 at RM 1.10 per sqft. This works out to RM312,222.24. As for the period thereafter, I am not inclined to allow market rent in light of the evidence that the defendant no longer had use of it after the plaintiff had erected a chain link fence sometime in end of 2012. The plaintiff is, however, entitled to nominal damages. In the circumstance, I award the plaintiff nominal damages of RM10,000 for 2013 and a sum of RM7,000 for the period between January 2014 to date of judgment.

[47] The plaintiff did not seek the removal of the tarmac on its land. In the result, I hold that the trespass in relation to the tarmac has ceased as at the date of judgment.

[48] As for the drainage and the underground structures, I give the defendant 12 months, as requested by it, to remove these from the plaintiff's land. In the interim, until the removal of all the structures, the defendant is to pay the plaintiff market rent at RM1.10 cent per sqft.

[49] The defendant to pay the plaintiff costs in the sum of RM100,000.

Order accordingly.

Reported by Ashok Kumar